No. 02-1062

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS, NEW YORK,
Petitioner,

v.

TCG, NEW YORK, INC.; TC SYSTEMS, INC.; AND TELEPORT COMMUNICATIONS dba TCNY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER THE CITY OF WHITE PLAINS, NEW YORK

HENRY W. UNDERHILL, JR.*
General Counsel/Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

* Counsel of Record

(*Additional Counsel Listed On Inside Cover*)

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JUAN OTERO
Principal Legislative Counsel
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Ave., N.W.
Suite 550
Washington, D.C. 20004
(202) 626-3020

JEFF ARNOLD
Deputy Legislative Director
THE NATIONAL ASSOCIATION
OF COUNTIES
440 First Street, N.W.
Suite #800
Washington, D.C. 20001
(202) 393-6226

RON THANIEL
Assistant Executive Director
THE UNITED STATES
CONFERENCE OF MAYORS
1620 I Street, NW
Washington, D.C. 20006
(202) 861-6711

ELIZABETH BEATY
Executive Director
THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS
8405 Greensboro Drive,
Suite 800
McLean, VA 22102
(703) 506-3275

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Brief of Amici Curiae the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the International Municipal Lawyers Association in Support of the Petitioner the City of White Plains, New York

The amici curiae, the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the International Municipal Lawyers Association file this Brief in Support of Petitioner, the City of White Plains, New York, and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The amici consist of organizations representing local government officials throughout the United States. The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3066 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interest of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the Untied States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The amici's interest in this case arises because the decision below significantly erodes local government's traditional police power to regulate the use of public rights of way and to require compensation for that use. Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.), to promote competition in the delivery of telecommunications services. Since its enactment, the number of entities seeking to disrupt public rights of way to install telecommunications facilities has risen dramatically. The construction and maintenance of telecommunications facilities create significant stresses on local government infrastructure and budgets. To minimize the negative effects of these disruptions, local governments have sought to regulate and coordinate the use of public rights of way for telecommunications purposes, while still allowing for competition between the various telecommunications providers. The Second Circuit's decision in this case frustrates the ability of local governments to achieve this end in that circuit and on a national level. Therefore, the amici respectfully urge this Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Second Circuit, by misinterpreting the § 253 of the Telecommunications Act of 1996, improperly preempted portions of the City of White Plains telecommunications ordinance and franchise agreement. The court's various misinterpretations are in conflict with other circuit courts of appeals decisions, in conflict with at least one relevant state court decision, and in conflict with this Court's precedent.

Additionally, courts outside the Second Circuit, at both the state and federal trial and appellate levels, are now relying on the reasoning of the Second Circuit in preempting local government ordinances managing public rights of way. Because of the important nature of this case, the need for Supreme Court guidance on this question of federal law, the conflict between relevant court decisions, and the departure from Supreme Court precedent, amici urge this Court to grant the petition for certiorari.

ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI

The amici file this brief in support of the City of White Plains, New York's (the "City") petition for certiorari. The correct interpretation of § 253 of Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 253 (the "Act") is of vital importance to local governments throughout the United States. The Act affects virtually every community in the Nation. The Second Circuit's interpretation of the Act significantly erodes local government's traditional police power to regulate the use of public rights of way and to require compensation for that use. Further, in these times of fiscal uncertainty, when local government budgets are stretched to cover an ever growing list of social needs, local governments must be able to exercise discretion to determine the best use of their public rights of way, thereby determining the best use of their scarce financial resources.

The amici submit the Second Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The amici further submit the Second Circuit's decision is in conflict with the decisions of

other United States courts of appeals on the same question of federal law, and is in conflict with the decisions of state courts. These factors make this case one of exceptional importance and appropriate for review by this Court.

I. INTERPRETATION OF THE PHRASE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" REQUIRES THIS COURT'S GUIDANCE

The Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Telecommunications Act of 1996, 47 U.S.C. § 253 (a). The clear language of this section provides for the preemption of only those local government regulations which **prohibit or have the effect of prohibiting** the ability of any entity to provide interstate or intrastate telecommunications service.

The meaning of the phrase "prohibits or have the effect of prohibiting" causes confusion in the courts. In fact, all of § 253 causes confusion in the courts. "This much is clear: Section 253 . . . has created a fair amount of confusion." *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002). *See also, BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186 (11th Cir. 2001) ("As has been observed by other federal courts, the language and structure of § 253 raises two difficult questions of statutory interpretation: (1) what is the preemptive scope of § 253; and (2) who may seek enforcement of the provisions of § 253?")

As a result of this confusion, the courts, including the Second Circuit, have wandered far afield in deciding whether local government regulations prohibit or have the effect of prohibiting the provision of services. Several courts of appeals have concluded that § 253 (c) **broadly preempts** local government regulation. "The preemption is virtually absolute and its purpose is clear - - certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena." *City of Auburn v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002). Similarly, the Second Circuit, reviewing the challenged, non-fee related provisions of the City's ordinance, stated those provisions were "*relevant only for regulating telecommunications, which § 253 does not permit . . . .*" Pet. App. at 24a. (Emphasis added).

That the Act broadly preempts local government regulation is erroneous, and unfortunately, provides the basis for finding that local ordinances - in this case, the City of White Plains' ordinance - violate the Act.

Due to the misinterpretation of the preemptive scope of the Act, the Second Circuit and other courts fail to give the plain language of the statute its obvious meaning. As a result, the courts fail to apply the Act correctly to the facts of the cases before them. Because the courts interpret the Act as broadly preventing local governments from regulating telecommunications companies, the courts conclude, without more, that an incredible variety of regulations have a "prohibitory" effect on telecommunications providers.

One aspect of this broad preemptive interpretation is that the courts use § 253 (c) to determine whether a particular regulation prohibits the provision of telecommunications services. Section 253 (c) provides in part that "[n]othing in [Section 253] affects the authority of a State or local government to manage the public rights of way . . . ." Several courts have concluded that if a regulation does not regulate the rights of way, it must be a prohibition on the provision of service. *See, eg.*, *City of Auburn*, 260 F.3d at 1177. The Second Circuit concluding that the challenged provisions were not saved by § 253 (c), stated that "[t]he disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 does not permit White Plains to do. . . ." Pet. App. at 24a.

This analysis is in error on two counts. First, if a regulation is not related to the management of the rights of way, it is not per se a prohibition under § 253 (a). Whether a regulation is "saved" under § 253 (c) is a completely separate determination from whether it affects a prohibition under § 253 (a). The subsections are related only to the extent that any regulation which prohibits the provision of services is saved if it manages the right of way. This precept, however, cannot be flipped on its head as the Second Circuit and other courts of appeal have done. The plain text of the statute does not support a finding that any regulation that is not related to management of the rights of way must be a prohibition.

This mistaken linking of § 253 (a) and § 253 (c) highlights a second error engaged in by the Second Circuit and other courts of appeals: Whether a regulation prohibits or has the effect of prohibiting competition must be established by **evidence.** "In the case of a dispute over a local regulation . . ., once the party seeking preemption **sustains its burden**

of showing that a local municipality has violated Section 253 (a) by formally or effectively prohibiting entry into the . . . market, the burden of proving the regulation falls within the safe harbor in Section 253 (c) falls on the defendant municipality." *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002). (Emphasis added).

The Third's Circuit's analysis is correct - telecommunications companies must provide evidence and sustain their burden of proving that a prohibition has occurred. The Second Circuit, however, has skipped this step by misreading the clear language of the Act, and thereby furthered confusion as to the proper method of analyzing challenges to local government ordinances under the Act.

The Second Circuit requested interpretive assistance from the Federal Communications Commission ("FCC") and received qualified responses to these questions. Nonetheless, the court cited the FCC's decision in *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191 (1997), which noted that an ordinance has the effect of prohibiting the provision of services when it "materially inhibits or limits" the ability of a telecommunications services provider to compete in a fair and balanced environment. Pet. App. at 15a. In spite of this, the Second Circuit made no findings regarding an inhibitory or limiting effect by the City's ordinance.

Reviewing various challenges to the City's ordinance, the court concluded that individual non-prohibitory code sections could, working together, have the effect of prohibiting telecommunications companies from providing services. "[T]o apply § 253 (a) to individual provisions without considering the Ordinance as a whole would neglect

the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions." Pet. App. at 16a. Simply reciting that a regulation affects a prohibition or materially inhibits competition, does not make it so.

Even if one assumes the validity of viewing individually non-objectionable provisions in conjunction with each other, the "whole" still does not prohibit or have the effect of prohibiting the provision of services. Unfortunately, as noted above, the Second Circuit merely observed that the provisions were "relevant only for regulating telecommunications, which § 253 does not permit White Plains to do . . . ." Pet. App. at 21a. The court failed to provide a detailed analysis of the actual prohibitory effect.

A complete review of these code sections, however, would indicate that many of them are simply reporting requirements, and encompass things that a telecommunications provider either has or should have reached a decision regarding before determining whether to proceed with entering into a particular market. Unfortunately, the Second Circuit dispensed with analyzing how the provisions affect a prohibition, skipping straight to whether the provisions were saved under § 253 (c). Conclusory statements should hardly suffice to sustain preemption of the City's ordinance. See, *New Jersey Payphone Association,* 299 F.3d at 240 (3d Cir. 2002).

The Second Circuit's conclusion regarding the permissible field of local government regulation conflicts with the Eleventh Circuit. "[I]f we read [253] (b) and (c) as delineating the absolute boundaries of state and local regulatory authority in the field of telecommunications, the

limitation set for in subsection (a) would be superfluous." *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001). The Second Circuit's holding that § 253 does not allow local governments to regulate telecommunications, except to the extent that such regulations relate to the rights of way, furthers a circuit split on this important issue.

In addition, the decisions holding that local governments may do no more than manage the rights of way conflict with at least one decision issued by a state court on the same question of law. "[The telecommunications providers'] argument presumes that the only legitimate regulatory domain of local governments is the control of rights-of-way, a presumption that cannot be squared with the language of the statute. . . ." *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002)(Table).[2]

Further, "[p]rinciples of federalism and home rule also counsel against using the authority of the federal courts to micromanage the operations of a local government by issuing broad, conclusory opinions about the effect of local

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[2]Amici acknowledge that this Court requires a decision be rendered by the highest state court in which a decision could be had. The intermediate appellate court in *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002)(Table), is the highest state court in which a decision could be had as the Oregon Supreme Court declined to exercise its jurisdiction in the case. *Sullivan v. Texas*, 207 U.S. 416 (1908). See, generally, ROBERT L. STERN, EUGENE GRESSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE, 141-143 (6th ed., BNA Books 1986).

regulations without carefully examining the proffered reasons for the local government's actions or affording deference to the expertise of local officials in managing their own [rights of way]." *Qwest Corporation v. City of Santa Fe, New Mexico*, 224 F. Supp. 2d 1305 (D. N.M. 2002), *appeal docketed*, No. 0202258 (Sept. 27, 2002), citing *Printz v. United States*, 521 U.S. 898, 928 (1997).

Because the Second Circuit and other federal courts of appeals are misinterpreting the extent of the preemption provided in § 253 (a) and misinterpreting that section's relationship with § 253 (c), and because the decisions of the federal courts of appeal conflict with each other and at least one relevant state court decision, this Court is respectfully requested to grant the City's petition for certiorari to provide guidance as to the appropriate construction of "prohibit or have the effect of prohibiting."

II. THE SECOND CIRCUIT AND OTHER LOWER COURTS IMPROPERLY RESTRICT THE PHRASE "MANAGE THE PUBLIC RIGHTS-OF-WAY"

Just as the courts misinterpret the proper application of the phrase "prohibit or have the effect of prohibiting," the courts also misinterpret what it means to "manage the public rights-of-way." The courts have unnecessarily limited the meaning of the word "manage," concluding that only regulations which relate to compensation, timing, and the manner of the excavation and repair of rights of way are appropriate. *City of Auburn*, 260 F.3d at 1177 (managing the rights of way means control over the right of way itself, not control over the companies with facilities in the right of way).

Several courts have looked to the FCC's interpretation of § 253 (c) and that Section's legislative history to support their interpretation. Specifically, the courts conclude that these "types of activities" fall within the management sphere: coordination of construction schedules, timing and location of excavations, enforcement of building and zoning codes, and similar requirements. *City of Auburn*, 260 F.3d at 1177, citing *In re TCI Cablevison of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1997), and Senator Dianne Feinstein's comments during the floor debate of 253 (c), 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein). However, these items are only examples of the types of things that are permissible, and should not be considered an exhaustive list.

Had Congress intended this list to be exhaustive, Congress could have explicitly limited local government authority to these types of activities. Congress did not do this, but chose instead to use the phrase "manage" the rights of way. According to Webster's Seventh New Collegiate Dictionary, the definitions of the word "manage" include:

> 1. Handle, Control
> 2. to make or keep submissive
>
> ****
>
> 1a. To direct or carry on business or affairs

Webster's Seventh New Collegiate Dictionary 513 (1969). Congress was surely aware of the meaning of the word "manage" when it drafted the Act. In general, it is "presumed that 'the ordinary meaning of [a statute's] language accurately expresses the legislative purpose.'" *Missouri Municipal League v. Federal Communications Commission*, 299 F.2d

949 (8th Cir. 2002), *quoting Morales v. Trans World Airlines, Inc.*, 502 U.S. 374 (1992).

Further, it is simply incorrect to conclude that information relating to the financial and technical capabilities of a telecommunications company, its plans for the provision of service in a jurisdiction, and similar disclosure requirements are unrelated to the management of the rights of way. Each of these factors is intimately related to the management of the rights of way because it is only through an evaluation of these factors that a local government can reach a conclusion as to whether a particular provider is an appropriate candidate for the use of the rights of way. If a telecommunications provider is not financially or technically capable and a local government grants the company authority to proceed regardless of this incapability, the local government must later expend valuable resources to rectify the situation. Congress surely did not intend to place local governments in such a precarious position. The fallacy of such a conclusion can be seen by the spate of financial disasters which are plaguing telecommunications providers and causing many local governments to scramble to alleviate problems associated with these corporate implosions.

The Second Circuit did not define what it considered appropriate management, but presumably relied on the same logic as other courts of appeals when it held that none of the challenged ordinance provisions qualified as management. Pet. App. at 24a. The court failed to provide reasons why the challenged sections were not related to the management of the rights of way, concluding that the provisions were "relevant only for regulating telecommunications, which § 253 does not permit . . . ." Pet. App. at 24a.

This conclusion fails to appropriately take into account the plain meaning of the statute. The more appropriate finding is that "[t]he intent of section 253 (c) was to leave undisturbed the traditional local authority to 'manage the public rights-of-way." *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (2001), *appeal dismissed*, (11 th Cir. Aug. 30, 2001) (No. 01-13218). Because the Second Circuit's decision advances an incorrect interpretation of the phrase "manage the public rights-of-way," this Court is respectfully requested to accept this case and provide guidance as to the appropriate application of the phrase.

III. INVALIDATION OF THE PUBLIC INTEREST STANDARD CONFLICTS WITH THIS COURT'S PRECEDENT

The Second Circuit also improperly determined that the Act prohibits the City from exercising discretion in reviewing franchise applications. The court relied upon *City of Auburn* for the principles that actions taken for the "public interest" by local government legislative bodies provide legislators with discretion and that the Act prohibits the exercise of discretion. Pet. App. at 24a.

As the Petitioner points out, this Court has approved the "public interest" standard and the Second Circuit's finding in this regard is contrary to this Court's precedent. Pet. at 28. Reviewing actions of the FCC under the Communications Act of 1934, 47 U.S.C § 151, *et seq*., (1934), in *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), this Court noted that the "public interest" standard

must be evaluated in the context of the purpose of that act.[3] Citing to several of its earlier decisions, this Court approved of the "public interest" standard. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), *see also Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24 (1932). Speaking specifically of radio transmissions, the Court stated that the public interest standard should be viewed in terms of the "scope, character, and quality of services." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), citing *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

Just as the public interest standard was acceptable in *National Broadcasting*, so too, is it acceptable in local regulations governing telecommunications services, specifically, regulations governing the granting of franchises for use of the public rights of way. Just as the FCC was charged with ensuring the best possible service for the public in terms of radio services, so, too, are local governments obligated to ensure the best possible use of their rights of way. As such, the Second Circuit's decision regarding the vagueness of the public interest standard is in direct conflict with this Court's precedent. Therefore, it is respectfully requested that this Court grant certiorari to reiterate the validity of the public interest standard.

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[3]The Communications Act of 1934 provided in relevant part that the Federal Communications Commission should from time to time, as public convenience, interest or necessity required, make rules and regulations and prescribe restrictions and conditions as necessary. See, § 301, generally.

CONCLUSION

For the foregoing reasons, amici join the City of White Plains in its request that the Court grant the petition for certiorari in the above referenced case.

Respectfully submitted,

Henry W. Underhill, Jr.
General Counsel/Executive Director
International Municipal Lawyers Association
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424
Counsel of Record